

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CONFEDERATED TRIBES AND BANDS OF)	
THE YAKAMA NATION; CATHERINE)	NO. CV-06-3032-LRS
SANCHEY WOLFSBERGER,)	
)	
Plaintiffs,)	ORDER OF DISMISSAL
)	
-vs-)	
)	
UNITED STATES OF AMERICA; P. LYNN)	
SCARLETT, Acting Secretary of the)	
Interior; MICHAEL D. OLSEN, Acting)	
Principal Deputy Assistant)	
Secretary, Indian Affairs; WILLIAM)	
PATRICK RAGSDALE, Director, Bureau)	
of Indian Affairs; STANLEY SPEAKS,)	
Northwest Regional Director,)	
Bureau of Indian Affairs; PIERCE)	
HARRISON, Administrator, Wapato)	
Irrigation Project; U.S.)	
DEPARTMENT OF THE INTERIOR; BUREAU)	
OF INDIAN AFFAIRS; WAPATO)	
IRRIGATION PROJECT,)	
)	
Defendants.)	
)	
)	

Before the Court is Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction (Ct. Rec. 12), filed October 18, 2006, and noted without oral argument.

I. BACKGROUND

Plaintiffs Yakama Nation ("YN") and one enrolled member, Catherine Sanchey Wolfsberger (collectively "Plaintiffs") seek to enjoin Defendants from imposing fees for the operation and maintenance

1 ("O&M") of the Wapato Irrigation Project ("WIP") upon the YN whose
2 land allegedly does not generate adequate funds to pay for the O&M
3 charges. Additionally, Plaintiffs seek declaratory relief that the
4 regulations at 25 C.F.R. Part 171 and the July 11, 1960 BIA
5 Memorandum ("1960 Memorandum")¹ authorizing O&M assessments are invalid
6 as "a matter of law." Complaint at 2. Plaintiffs assert jurisdiction
7 pursuant to 28 U.S.C. §§ 1331, 1361, 2201, 2202 and the Administrative
8 Procedures Act ("APA"), 5 U.S.C. §§ 701-706.

9 Under the Act of August 1, 1914, 38 Stat. 582 Congress provided
10 that the Secretary of the Interior may set maintenance charges which
11 shall be paid as he may direct, such payments to be available for use
12 in maintaining the particular irrigation project or system for which
13 payment is collected. YN and individual Yakama land owners, owning
14 property encompassed by the WIP were assessed for O&M charges
15 beginning in the mid-1980s. Complaint at 6-7. In March and July of
16 2000, the WIP Administrator sent two sets of O&M assessments to
17 Plaintiffs. March assessments were for the 2000 irrigation season and
18 July assessments were those still owing for certain pre-2000
19 irrigation seasons. Id. at 8.

20 Plaintiff YN filed assessment appeals pursuant to 25 C.F.R. Pt. 2
21 to the BIA Northwest Regional Director ("Regional Director")
22

23 ¹This is the 1960 Memorandum prepared by the Assistant Commissioner
24 for Indian Affairs to the BIA Area Directors of Billings, Gallup,
25 Phoenix, Portland, and Sacramento which classified Indian irrigation
26 projects into one of five categories for purposes of requesting O&M
funding under available appropriations.

1 concerning both the 2000 and pre-2000 assessments. *Id.* On March 12,
2 2001, the Regional Director issued a decision addressing a number of
3 the issues raised by Plaintiffs but noting that he did not have
4 jurisdiction to address Plaintiffs' claims as to the validity of 25
5 C.F.R. Part 171 and the 1960 Memorandum described in footnote number 1
6 above. *Id.* at 9.

7 A series of stays were requested by the parties and granted by
8 the Interior Board of Indian Appeals ("IBIA") to facilitate settlement
9 discussions. Those discussions failing, the YN filed its opening
10 brief to the IBIA. Three weeks later, April 5, 2006, Plaintiffs YN
11 and Ms. Wolfsberger filed this action. On July 12, 2006 the IBIA
12 vacated the Regional Director's March 12, 2001 Decision and remanded
13 the matter to him for further consideration and issuance of a new
14 decision. See "Order Vacation Decision and Remanding," attached to
15 Ct. Rec. 14. The remand order was based on the Regional Director's
16 request to vacate his decision and remand the matter for a new
17 decision. To date, the Regional Director has not issued his new
18 decision.

19 II. DISCUSSION

20 A. Motion to Dismiss for Lack of Subject Matter Jurisdiction 21 Standards

22 Pursuant to Federal Rule of Civil Procedure 12(b)(1), a district
23 court must dismiss an action if the court lacks jurisdiction over the
24 subject matter of the suit. Fed.R.Civ.P. 12(b)(1). The party seeking
25 to invoke federal jurisdiction bears the burden of establishing that
26 jurisdiction exists. *Scott v. Breeland*, 792 F.2d 925, 927 (9th Cir.
1986). A complaint will be dismissed under Rule 12(b)(1) for lack of

1 subject matter jurisdiction if (1) the cause does not "arise under"
2 any federal law or the United States Constitution, (2) there is no
3 cause or controversy within the meaning of that constitutional term,
4 or (3) the cause is not one described by any jurisdictional statute.
5 *Baker v. Carr*, 369 U.S. 186, 198, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962).

6 Similarly, Rule 12(h)(3) provides, "Whenever it appears by
7 suggestion of the parties or otherwise that the court lacks
8 jurisdiction of the subject matter, the court shall dismiss the
9 action." Although the defendants are the movants, the party invoking
10 the federal jurisdiction, the plaintiffs here, have the burden of
11 showing that jurisdiction is proper. *Thornhill Publishing Co. v.*
12 *General Tel. & Electronics Corp.*, 594 F.2d 730 (9th Cir.1979). The
13 court presumes a lack of jurisdiction until the party asserting
14 jurisdiction proves otherwise. *Kokkonen v. Guardian Life Ins. Co. of*
15 *America*, 511 U.S. 375, 114 S.Ct. 1673, 1675, 128 L.Ed.2d 391 (1994).

16 An action can be brought by a party against the United States
17 only to the extent that the Federal Government waives its sovereign
18 immunity. See *Blackburn v. United States*, 100 F.3d 1426, 1429 (9th
19 Cir.1996). Where there is no waiver of sovereign immunity, it is
20 appropriate for the Court to dismiss an action for lack of subject
21 matter jurisdiction. *Gilbert v. Da Grossa*, 756 F.2d 1455, 1458 (9th
22 Cir.1985).

23 B. Defendants' Arguments

24 First, Defendants argue that the court should dismiss Plaintiffs'
25 complaint for lack of subject matter jurisdiction because Congress has
26 not waived Defendants' sovereign immunity for the claims asserted.

1 Ct. Rec. 14 at 7. Defendants argue that the Declaratory Judgment Act
2 does not waive the federal government's sovereign immunity nor does it
3 constitute an independent basis for jurisdiction. Id. at 8.

4 Second, Defendants argue that there is no final agency action to
5 review under the APA. Id. at 9. Citing *Califano v. Sanders*, 430 U.S.
6 99, 105-07 (1977), Defendants assert the APA does not create an
7 independent basis of jurisdiction. In support of this argument,
8 Defendants indicate that Plaintiffs are currently prosecuting
9 administrative appeals pursuant to 25 C.F.R. Pt. 2. Within weeks of
10 taking affirmative steps to prosecute its administrative appeal,
11 Plaintiffs commenced the instant action. Id. at 10.

12 Third, Defendants argue that Plaintiffs' claims are not ripe for
13 several reasons. These reasons are: a) since the original
14 administrative appeal decision has been vacated, it is possible that
15 the relief sought by Plaintiffs may be provided in the context of the
16 new administrative appeal Plaintiffs have initiated; b) a substantial
17 number of factual issues exist that will be addressed when an agency
18 decision is final; c) plaintiffs have experienced no immediate and
19 significant hardships, i.e. all collection efforts have stopped
20 pending disposition of any appeal filed; and d) the court would
21 benefit from delaying judicial review for further factual developments
22 of the issues. In summary, Defendants contend that the administrative
23 appeal initialed by Plaintiffs concerning O&M assessments must be
24 allowed to reach a final agency decision.

25 Fourth, Defendants argue that Plaintiffs have failed to exhaust
26 their administrative remedies. The basis for the exhaustion

1 requirement Defendants state is to allow agencies to develop a
2 complete factual record. Further, based on the Bureau of Indian
3 Affairs' ("BIA") exhaustion rules, Defendants argue that their motion
4 to dismiss pursuant to Fed.R.Civ.P. 12(b)(1) should be granted because
5 the Ninth Circuit has held such rules to be jurisdictional in nature.
6 Defendants cite *Joint Bd. Of Control of Flathead, Mission and Jocko*
7 *Irrigation Districts v. U.S.*, 862 F.2d 195, 199 (9th Cir. 1988) to
8 support this argument.

9 Fifth, and last, Defendants assert that Plaintiffs' challenge to
10 25 C.F.R. §171 and the 1960 Memorandum is time-barred. As a general
11 rule, Defendants correctly indicate, challenges to agency actions or
12 administrative regulations are subject to a six year statute of
13 limitations. 28 U.S.C. §2401(a). Defendants state there is no
14 dispute that Plaintiffs' challenge to both the 1960 Memorandum, which
15 dates from 1960, and the regulation, which dates from 1977, was well
16 beyond the six year time frame. Ct. Rec. 14 at 17. Further,
17 Defendants argue, Plaintiffs advance their challenge only on
18 procedural grounds, alleging that the issuance of the 1960 Memorandum
19 violated the APA and Freedom of Information Act ("FOIA") because the
20 Department of the Interior never published a rulemaking notice, nor
21 provided an opportunity for public comment. Id. at 18. Because
22 Plaintiffs have challenged only the way in which they were promulgated
23 rather than the substance of the rules, Plaintiffs' right of action
24 accrued when the 1960 Memorandum was issued or when the 25 C.F.R.
25 regulations were promulgated. Thus under the Ninth Circuit ruling in
26 *Wind River Mining Corp. v. Lujan*, 946 F.2d 710 (9th Cir. 1991), these

1 claims are barred. Defendants further assert that even if Plaintiffs
2 did make an "as applied" challenge, the Complaint alleges application
3 of the 1960 Memorandum and regulation to YN occurred in the mid-
4 1980's, still making their instant challenge well outside the six year
5 statute of limitations period.

6 C. Plaintiffs' Arguments

7 Plaintiffs' predominant theory in opposition to dismissal is
8 language from the RD found in the March 12, 2001 decision stating that
9 he did not have jurisdiction to address Plaintiffs' claim as to the
10 validity of 25 C.F.R. Part 171 and the 1960 Memorandum. Plaintiffs
11 argue that the agency action declining jurisdiction to decide whether
12 BIA regulations and the 1960 Memorandum are invalid is final and there
13 are no more administrative remedies for them to exhaust.

14 Further, Plaintiffs state that they are not barred by the statute
15 of limitations because they seek a ruling that the substance of the
16 agency actions in issuing the bills on 2000 and 2006 exceeded and was
17 in violation of its statutory authority. In other words, Plaintiffs
18 state that their claims accrued when the BIA sought to bill the
19 Plaintiffs in 2000 and 2006 for O&M assessments. At issue here,
20 according to Plaintiffs, is whether the Defendants can pass on the
21 full cost of the project and seek reimbursement from the Plaintiffs
22 for the 2000 and 2006 bills or assessments. Ct. Rec. 21 at 11.

23 As to subject matter jurisdiction, Plaintiffs argue that the
24 court has jurisdiction because the APA waives sovereign immunity. As
25 to ripeness, Plaintiffs argue that their claims are ripe because the
26 issues are purely legal and the federal defendants have not ceased

1 assessing O&M charges despite pending appeals. Additionally,
2 Plaintiffs indicate that hardship to them would be significant if
3 review is withheld by this court as the BIA has not ceased its O&M
4 assessments and collections against them while the administrative
5 appeals are pending, despite what Defendants have represented.²

6 **III. ANALYSIS**

7 The APA, as amended (5 U.S.C. §§701-706), waives federal
8 sovereign immunity for judicial review of final agency action. The
9 Court has reviewed the parties' written arguments and finds that there
10 is no final agency decision. The IBIA has vacated the RD's 2001
11 decision and has remanded the matter back to the RD for further
12 consideration and issuance of a new decision. Further, the RD has not
13 yet issued a decision on Plaintiffs' appeal of the 2006 assessments,
14 filed with the IBIA. The Court concludes that the vacating of the
15 RD's decision and the rendering of a new decision may make further
16 appeals to the IBIA and the Court's hearing of Plaintiffs' complaint
17 in district court unnecessary.

18 The exhaustion rule allows an administrative agency to develop a
19 complete factual record, to apply its expertise and discretion, and
20 possibly to resolve the conflict without judicial intervention. B.
21 Mezines, J. Stein and J. Gruff, 5 Administrative law § 49.01, pg. 49-3
22 (1988). Exhaustion insures that a court will have the benefit of the
23 agency's experience in exercising administrative discretion, as well
24 _____

25 ²Plaintiffs state that in March 2006, while the 2000 and pre-2000
26 appeals were before the IBIA, the agency issued new O&M assessments to
YN for the irrigation year 2006. Ct. Rec. 21 at 8.

1 as a factual record to review. *Id.* Courts pragmatically interpret
2 administrative finality, considering "whether the process of
3 administrative decisionmaking has reached a stage where judicial
4 review will not disrupt the orderly process of adjudication and
5 whether rights or obligations have been determined." *Port of Boston*
6 *Marine Terminal Assoc. v. Rederiaktiebolaget Transatlantic*, 400 U.S.
7 62, 71, 91 S.Ct. 203, 209, 27 L.Ed.2d 203 (1970).

8 There are outstanding factual issues identified by the RD in the
9 vacated decision and by Plaintiffs in their administrative appeal that
10 strongly suggest this case is not ripe for review by this Court. For
11 instance, the accuracy of ownership information on which the O&M
12 assessments are based; whether assessments are made where WIP
13 facilities cannot deliver water; and whether BIA failed to properly
14 lease lands subject to O&M assessments or permitted trespass without a
15 valid lease. The final agency decision will address these factual
16 issues, based upon an administrative record developed on appeal.
17 Premature judicial review would inappropriately interfere with agency
18 action when it denies the agency the opportunity to apply its
19 expertise and correct its own mistakes. *Ohio Forestry Ass'n v. Sierra*
20 *Club*, 523 U.S. 726, 735 (1998).

21 The Court expresses no opinion regarding issues raised in this
22 litigation which are beyond the scope of this order. Simply stated,
23 given IBIA's remand order vacating the RD's 2001 decision, all
24 discussions, including any comments on jurisdiction, stand as a
25 nullity in Plaintiffs' administrative appeal. Moreover, a new
26 decision by the RD may resolve some or all of Plaintiffs' issues and

1 make further appeal to the IBIA or this Court unnecessary or, at the
2 very least, narrow the issues for review.

3 Finally, as to any alleged hardships suffered by Plaintiffs, the
4 Court finds lacking any concrete proof of irreparable harm suffered in
5 connection with the administrative remedy exhaustion requirement. The
6 Court notes Defendants' representation that for any O&M assessments
7 which have been appealed by Plaintiffs, all collection efforts have
8 stopped pending disposition of any appeal filed.³

9 Accordingly,

10 **IT IS ORDERED** that:

11 1. Defendants' Motion to Dismiss for Lack of Subject Matter
12 Jurisdiction, Ct. Rec. 12, filed October 18, 2006, is GRANTED. The
13 claims are hereby dismissed without prejudice.

14 2. The District Court Executive is directed to:

15 (a) File this Order;

16 (b) Provide a copy to counsel of record; and

17 (c) CLOSE THIS FILE.

18 **DATED** this 19th day of December, 2006.

19 *s/Lonny R. Suko*

20 _____
21 LONNY R. SUKO
22 UNITED STATES DISTRICT JUDGE
23
24

25 ³Defendants represent that "it is neither the policy nor practice of
26 the BIA to initiate collection activities after an appeal has been
filed." Ct. Rec.23 at 9.